IN THE

Supreme Court of the United States

No. 394.

October Term, 1952.

ROBERTA WELLS, As Administratrix of the Estate of CHEEK WELLS,

Petitioner,

v.

SIMONDS ABRASIVE COMPANY,

Respondent.

On Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

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OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported in 102 F. Supp. 519.

The opinions of the Court of Appeals for the Third Circuit are reported in 195 F. 2d 814.

JURISDICTION.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U. S. C. § 1254).

QUESTION PRESENTED.

Whether in a diversity action for a wrongful death which occurred in Alabama, brought by an Alabama administratrix in a Federal Court sitting in Pennsylvania, a Federal Court may apply the limitation provision of the forum which is applicable to the cause of action, created by the law of the forum, that is comparable to the foreign statute on which the suit is based, without violating the full faith and credit clause of the United States Constitution.

STATUTES INVOLVED.

The statutes involved are:

The Alabama Homicide Act. Tit. 7, Code of Alabama 1940, Section 123 (Appendix p. 26).

The Alabama Survival Acts. Tit. 7, Code of Alabama 1940, Sections 150 and 153 (Appendix p. 27).

The Pennsylvania Wrongful Death Acts. Act of April 15, 1851, P. L. 669, Section 19, 12 P. S. Section 1601; Act of April 26, 1855, P. L. 309, Sections 1 and 2 (as amended), 12 P. S. Sections 1602 and 1603 (Appendix p. 25).

The Pennsylvania Survival Act. Act of July 2, 1937, P. L. 2755, Section 2, 20 P. S. Ch. 3, App. Section 772 (Appendix p. 26).

The Constitution of the United States, Article IV, Section 1.

ARGUMENT.

Summary.

Alabama has a Wrongful Death Act (Appendix p. 26), known as the Homicide Act, which authorizes a suit for wrongful death to be brought "within the State of Alabama, *and not elsewhere*" within two years after the death. (Emphasis supplied.) Pennsylvania also has a Wrongful Death Act (Appendix p. 25), which authorizes a suit to be brought for wrongful death within one year after the death. Petitioner brought an action under the Alabama Death Act in the United States District Court, sitting in the Eastern District of Pennsylvania, more than one year, and less than two years, after her decedent's death.

The Pennsylvania Courts have held that death actions brought in Pennsylvania for deaths occurring elsewhere must be brought within the one-year period of limitation which is applicable to death actions brought in Pennsylvania to recover for deaths occurring in that state. This being a diversity case the Courts below applied the Pennsylvania rule and held that, since the suit could not have been maintained in a Pennsylvania court because brought more than one year after the death, it could not be maintained in a Federal court sitting in Pennsylvania.

Unlike Alabama, Pennsylvania also has, in addition to its Death Statute, what is known as a Survival Statute (Appendix p. 26), which merely continues in the personal representatives of one who has died as a result of injuries, the right of action which accrued to the deceased at common law because of the tort. The parties for whose benefit this action may be brought are different from those entitled to be compensated in a death action, and the action may be brought within two years after the death instead of within the one year period prescribed for the Death Statute. There

is no comparable statute in Alabama and no such right of action exists under its laws.

Completely ignoring the difference between the two statutes, the Death Statute and the Survival Statute, and the different rights of action which they create, differences which the Pennsylvania courts have always scrupulously observed, petitioner is seeking to gain in her death action the benefit of the two-year period of limitation of the Pennsylvania Survival Act and thereby avoid the one-year limitation of the Death Act. Since the Alabama Death Act finds its Pennsylvania counterpart in the Pennsylvania Death Act, and not in the Pennsylvania Survival Act, the Courts below held that a suit brought in Pennsylvania based upon the right of action created by the Alabama Death Act must be brought within the one-year period of limitation of the Pennsylvania Death Act.

It is submitted that in so holding the Courts below did no violence to the Full Faith and Credit Clause of the Constitution.

I. The Alabama Act.

The Alabama Act (Appendix p. 26), under which the petitioner brought her suit, is a death act and not a survival act. The Alabama courts have consistently so declared. *Smith v. Lilley*, 252 Ala. 425, 430, 41 So. 2d 175, 179 (1949); *Parker v. Fies & Sons*, 243 Ala. 348, 350, 10 So. 2d 13, 15 (1942); *Bruce v. Collier*, 221 Ala. 22, 23, 127 So. 553, 554 (1930); *Webb v. French*, 228 Ala. 43, 45, 152 So. 215, 217 (1934); *Kennedy v. Davis*, 171 Ala. 609, 612, 55 So. 104, 105 (1911). The nature of the right created by the Alabama Act is succinctly stated in *Parker v. Fies & Sons*, *supra* (243 Ala. at p. 350, 10 So. 2d at p. 15):

> "*Our Homicide Act is a death statute*, a punitive Statute to prevent homicides. *It creates a new and distinct cause of action, unknown at common law. The cause of action comes into being only upon death from wrongful act.*

"These concepts are so fully settled that further statement need not be indulged. Breed v. Atlanta B. & C. R. Co., 241 Ala. 640, 4 So. 2d 315; Pickett v. Matthews, 238 Ala. 542, 192 So. 261; Anno. Code of 1940, Title 7 § 123." (Emphasis supplied.)

In the same case the Court further emphasized its holding that the Alabama Homicide Act is a death statute and not a survival statute, and that it has no similarity whatever to the Pennsylvania Survival Act, the nature of which was clearly defined in *Piacquadio v. Beaver Valley Service Co.*, 355 Pa. 183, 185, 49 A. 2d 406, 407 (1946), by saying (243 Ala. at p. 349, 10 So. 2d at p. 14):

"The statute providing for survival of actions for 'injuries to the person' does not apply to actions for injuries from wrongful act resulting in death, with a consequent right of action under the Homicide Act. The survival statute has a field of operation in actions where death ensues from other causes. *The lawmakers did not contemplate two actions* by the same administrator *against the same defendant for the same tort* prosecuted to separate judgments, *one to recover for personal injuries for the benefit of the estate, and another for punitive damages for the benefit of next of kin.*" (Emphasis supplied.)

As appears from the foregoing statement, Alabama also has an Act called a Survival Act (Appendix p. 27), which, however, is not the Act under which the petitioner is suing and which has no relation at all to the Pennsylvania Survival Act. Under that Alabama Act a right of action survives and may be continued by the personal representative, but *only* if the death ensues from causes other than the accident on which the suit was based. Thus the Alabama Survival Act likewise has no similarity whatever to the Pennsylvania Survival Act, which authorizes personal representatives themselves to bring an action based upon the accident which caused their decedent's death while the sepa-

rate cause of action under the Pennsylvania Death Act is also being prosecuted. *Pezzuli v. D'Ambrosia*, 344 Pa. 643, 26 A. 2d 659 (1942).

The Supreme Court of Alabama has held that the Homicide Act provides the exclusive remedy where death results from the same wrongful act that is the basis of decedent's suit for personal injuries, and in such case, therefore, a decedent's action does *not* survive to his personal representative. *Bruce v. Collier*, 221 Ala. 22, 127 So. 553 (1930). Under the Alabama Survival Acts the personal representative may revive a pending suit for personal injuries upon the death of the plaintiff from causes unassociated with his accident and may recover the same damages that the decedent might have recovered; but *if death results from the same negligent act*, the only right of action in the personal representative is *not* the common law right of the decedent to recover for personal injuries, which is the only right involved in the Pennsylvania Survival Act, *Pezzuli v. D'Ambrosia*, 344 Pa. 643, 26 A. 2d 659 (1942), but the statutory right to recover for wrongful death created by the Homicide Act. In such circumstances any suit begun by the decedent in his lifetime must be abandoned by his personal representative, and, unlike Pennsylvania, *Id.* at pp. 646, 660, a new suit for wrongful death must be instituted instead under the Homicide Act. *Parker v. Fies & Sons*, 243 Ala. 348, 350, 10 So. 2d 13, 14 (1942); *Smith v. Lilley*, 252 Ala. 425, 430, 41 So. 2d 175, 179 (1949). Obviously the Homicide Act does not pretend to keep alive any right of action that the decedent might have had. It is not a survival act at all, and the essential nature of the right created by that Act is therefore wholly different from that provided by the Pennsylvania Survival Act. Compare *Rudobersky v. Imperial Vol. Fire Dept.*, 368 Pa. 235, 81 A. 2d 865 (1951).

The Alabama Homicide Act, under which petitioner brought her suit, provides only a right of action for wrongful death, which is the same right of action created by the

Pennsylvania Wrongful Death Act and is wholly unlike the decedent's common law right of action for personal injuries that is continued in his personal representative under the Pennsylvania Survival Act. The Courts below were accordingly clearly right in applying the period of limitation provided by the Pennsylvania Death Act instead of that provided by the Pennsylvania Survival Act.

II. The Pennsylvania Act.

The Pennsylvania Wrongful Death Act (Appendix p. 25), consists of statutes enacted in 1851 and 1855, which, in Pennsylvania, are treated together as one Act. Suit must be brought within one year after death "and not thereafter". This is the only statutory basis for the "true action for wrongful death." *Goodrich-Amram Procedural Rules Service*, § 2201-38. It establishes a right of action in certain named beneficiaries to recover damages accruing to them because of the decedent's death. *Pezzulli v. D'Ambrosia*, 344 Pa. 643, 647, 26 A. 2d 659, 661 (1942); *Funk v. Buckley & Co., Inc.*, 158 Pa. Super. Ct. 586, 590, 45 A. 2d 918, 920 (1946). Under Pa. R. C. P. 2202(a), actions for wrongful death are brought, as are survival actions, by the decedent's personal representative.

The Pennsylvania Survival Act of 1937 (Appendix p. 26), provides for the commencement and prosecution by the personal representative of an action for fatal injuries to the decedent, which, as the Supreme Court of Alabama has said cannot be done under The Alabama Survival Act (*supra*, pp. 5-6), may be prosecuted by the same administrator against the same defendant to a separate judgment to recover damages for the benefit of the estate, at the same time that he is prosecuting another action for damages for the benefit of next of kin. This is not a "death statute" in any sense of the word but merely enables the decedent's personal representative to bring a separate suit, which is unknown to the law of Alabama, on the right of

action for personal injuries that had accrued to the decedent at common law because of the tort. *Pezzulli v. D'Ambrosia*, 344 Pa. 643, 647, 26 A. 2d 659, 661 (1942); *Piacquadio v. Beaver Valley Service Co.*, 355 Pa. 183, 185, 49 A. 2d 406, 407 (1946); *Funk v. Buckley & Co., Inc.*, 158 Pa. Super. Ct. 586, 591, 45 A. 2d 918, 920 (1946).

The Pennsylvania courts have always recognized a clear distinction between the right of action for wrongful death and the right of action under the Survival Act of 1937. *Pezzulli v. D'Ambrosia*, 344 Pa. 643, 647, 26 A. 2d 659, 661 (1942); *Stegner v. Fenton*, 351 Pa. 292, 294, 40 A. 2d 473, 474 (1945); *Piacquadio v. Beaver Valley Service Co.*, 355 Pa. 183, 185, 49 A. 2d 406, 407 (1946); *Murray v. P. T. C.*, 359 Pa. 69, 71, 58 A. 2d 323, 324 (1948); *Ferne v. Chadderton*, 363 Pa. 191, 197, 69 A. 2d 104, 107 (1949); *Funk v. Buckley & Co., Inc.*, 158 Pa. Super. Ct. 586, 590, 45 A. 2d 918, 920 (1946). In *Pezzulli v. D'Ambrosia, supra*, the distinction was defined by the Court in the following passage (344 Pa. at p. 647, 26 A. 2d at p. 660):

> "Under the present statutory law of Pennsylvania, if a suit for personal injuries is not brought during his life by the person injured *two* actions may be brought after his death (as they were in the present instance) for the recovery of damages—*one* under the acts of 1851 (section 19) and 1855, *the other* under the act of 1937. *Such actions are entirely dissimilar in nature.* The one represents a cause of action unknown to the common law and is for the benefit of certain enumerated relatives of the person killed by another's negligence; the damages recoverable are measured by the pecuniary loss occasioned to them through deprivation of the part of the earnings of the deceased which they would have received from him had he lived. The other is not a new cause of action at all, but merely continues in his personal representatives the right of action which accrued to the deceased at common law because of the tort; . . ." (Emphasis supplied.)

This distinction has, of course, been extended to the limitation provisions applicable to suits arising under these Acts. In *Stegner v. Fenton*, 351 Pa. 292, 40 A. 2d 473 (1945), the Supreme Court of Pennsylvania traced their history and held that suits under the Survival Act of 1937 are subject to the two-year statute of limitations while actions under the Wrongful Death Act are subject to its one-year limitation provision. *Id.* at pp. 296, 475. In reaching this conclusion the Court said (351 Pa. at p. 295, 40 A. 2d at p. 475):

> "*By no stretch of imagination* can the provisions of that act [the Act of 1855] be grafted upon the '*survival*' Act of 1937, supra, which was passed for an entirely different purpose. *The Acts of 1851 and 1855, supra, are 'death' statutes, not 'survival' acts.*" (Emphasis supplied.)

In *Piacquadio v. Beaver Valley Service Co.*, 355 Pa. 183, 49 A. 2d 406 (1946), the Supreme Court of Pennsylvania held that a complaint in a wrongful death action could not be amended more than two years after the injury to include an action for damages under the Act of 1937. The Court distinguished the two types of action in the following language (355 Pa. at p. 185, 49 A. 2d at p. 407):

> "Although they arise out of a common factual background, *the death action under the Acts of 1851 and 1855, is a separate and distinct cause of action from the cause of action for the decedent's injuries which survives his death under the Act of 1937.* 'The one represents a cause of action unknown to the common law and is for the benefit of certain enumerated relatives of the person killed by another's negligence . . . The other is not a new cause of action at all, but merely continues in his personal representatives the right of action which accrued to the deceased at common law because of the tort' . . . *Different statutes of limitation apply to the two causes of action. The one-year limitation of the*

Wrongful Death Act is not applicable to a suit brought pursuant to the Survival Act." (Emphasis supplied.)

The Supreme Court of Pennsylvania has consistently recognized the distinction between the rights of action under the Wrongful Death Act of 1855 and the Survival Act of 1937, not only in respect of the measure of damages recoverable under each, but also of the separate periods of limitation that are applicable to them. See also *Ferne v. Chadderton*, 363 Pa. 191, 197, 69 A. 2d 104, 107 (1949); *Fisher v. Hill*, 368 Pa. 53, 60, 81 A. 2d 860, 864 (1951). And it has continued to enforce, as it must in the absence of legislative modification, the one-year limitation provision of the Wrongful Death Act. See *Echon v. Pennsylvania Railroad Co.*, 365 Pa. 529, 532, 76 A. 2d 175, 177 (1950); *Foley v. The Pittsburgh-Des Moines Co.*, 363 Pa. 1, 9, 68 A. 2d 517, 521 (1949).

Petitioner, however, basing her argument on a misconception of the Pennsylvania law, as was pointed out by the Court below in its opinion on the petition for rehearing (R. 25), is trying to have applied to her action under the Death Statute the period of limitation applicable to an entirely different statute which creates a different right of action for the benefit of a different class of persons.

III. In Pennsylvania All Death Actions Are Alike Held Subject to the One Year Limitation of the Death Act of 1855.

The Pennsylvania decision which held that the Act of 1855 provided the period of limitation for all death actions brought in Pennsylvania Courts is *Rosenzweig v. Heller*, 302 Pa. 279, 153 Atl. 346 (1931). That case expresses what is still the law of Pennsylvania, and holds that the Act of 1855 is a statute of limitation that operates not only on rights of action for wrongful death arising in Pennsylvania but also on those arising in other states which are sought

to be enforced in Pennsylvania. Pennsylvania wrongful death actions are barred if not instituted within one year after the death, *Stafford v. Roadway Transit Co.*, 165 F. 2d 920, 923 (C. A. 3d, 1948); see *Echon v. Pennsylvania Railroad Co.*, 365 Pa. 529, 532, 76 A. 2d 175, 177 (1950), following *Rosenzweig v. Heller;* and foreign wrongful death actions are likewise subject to the one-year limitation provisions of the Pennsylvania Wrongful Death Act. See *Foley v. The Pittsburgh-Des Moines Co.*, 363 Pa. 1, 10, 68 A. 2d 517, 521 (1949), following *Rosenzweig v. Heller.*

It was for the very reason that Pennsylvania law and Pennsylvania courts treat all litigants alike and apply the one-year period of limitation to all death actions brought in Pennsylvania, whether the cause of action arose in Pennsylvania or elsewhere, that the Court below, in an opinion filed October 21, 1952, not yet reported (Appendix p. 28), in the case of *Quinn, Administratrix v. Simonds Abrasive Co.*, held again that to apply the Pennsylvania one-year limitation in a diversity case based on a death occurring in Ohio did not violate the full faith and credit clause because there was no discrimination.

In that case it was not possible for the plaintiff to confuse, as the petitioner has sought to do here, the Pennsylvania Survival Act with the Pennsylvania Death Act and thereby to assert a similarity between the Pennsylvania Survival Act and the foreign death act, since in Ohio, as in Pennsylvania, there is both a Wrongful Death Act, 7 Ohio Gen. Code Ann. § 10509-166, and a Survival Act, 8 Ohio Gen. Code Ann. § 11235. However, since it was clear in that case, as in this, that the foreign death act was a true wrongful death statute, *Rodney v. Staman,* 371 Pa. 1, 4, 89 A. 2d 313, 315 (1952), the same principle was applicable and the Court accordingly held that the one-year limitation of the Pennsylvania Death Act barred the action.

IV. The Full Faith and Credit Clause Has Not Been Violated.

The Pennsylvania Court's interpretation of the Wrongful Death Act in *Rosenzweig v. Heller* is expressive of a state policy which, far from being in conflict with the Full Faith and Credit clause of the Constitution, is of the kind which has heretofore been held, under the federal diversity jurisdiction, to be the duty of Federal Courts to enforce. *Angel v. Bullington*, 330 U. S. 183, 191 (1947); *Regan v. Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949). The object of the diversity jurisdiction is to insure that "the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a state court." *Guaranty Trust Co. v. York*, 326 U. S. 99, 109 (1945). Thus, state statutes of limitation are given the same effect in the federal courts as they would be given in the state courts. *Guaranty Trust Co. v. York, supra; Regan v. Merchants Transfer & Warehouse Co., supra.*

It is precisely that result which was accomplished by the judgment of the lower court in this case, which prevented recovery on a foreign right of action for wrongful death where suit was instituted later than the period permitted in Pennsylvania. Any other disposition would have achieved the result of allowing recovery by the petitioner because the accident happened in Alabama, although if it had occurred in Pennsylvania she would have been barred from enforcing in the Pennsylvania courts her right of action for wrongful death.

What was decided in *Hughes v. Fetter*, 341 U. S. 609 (1951) was that a state which has a wrongful death statute of its own cannot completely close the doors of its courts against a suit based upon a similar statute of another state. *Id.* at p. 611. The decision in that case turned on the fact that the statutory policy declared by the Wisconsin Supreme Court violated the Full Faith and Credit Clause because, while entertaining wrongful death actions for locally caused deaths, it excluded those of foreign origin. *Id.* at p.

612. That situation is fundamentally different from that in *Rosenzweig v. Heller*, p. 10 *supra*, in which the Pennsylvania Supreme Court applied the *same* statute of limitations to Pennsylvania and foreign death actions *alike*; and from that in this case, in which the District Court imposed the one-year limitation provision of the Pennsylvania Wrongful Death Act exactly as it would have been bound to do if the accident had occurred in Pennsylvania.

Thus the decisions in *Hughes v. Fetter* and in *First National Bank of Chicago v. United Airlines, Inc.*, 342 U. S. 396 (1952), which followed it, are not at variance with the decision of the Courts below in the present case, in which the petitioner has been treated in the same way as a Pennsylvania resident would have been treated in the same circumstances.

Since the rule was first established by this Court over one hundred years ago, no case has held that the Full Faith and Credit Clause was violated by a decision that the period of limitation of the forum is controlling, even though shorter than that granted by the state where the cause of action arose. See *McElmoyle v. Cohen*, 13 Pet. 312 (1839); *Townsend v. Jemison*, 9 How. 407 (1850); *Bank of Alabama v. Dalton*, 9 How. 522 (1850); *Bacon, et al. v. Howard*, 20 How. 22 (1857). Cf. also *Bank of the United States v. Donnally*, 8 Pet. 361, 372 (1834), and *Order of Travelers v. Wolfe*, 331 U. S. 586, 607 (1947).

It is accordingly clear that this Court has long given full effect to the statutes of limitations of the several states and held that, even though a claim was still not barred under the law of the state in which it arose, it could not be enforced in another state after the period of limitation fixed by the laws of such state.

This is in accord with the *Restatement of Conflict of Laws* § 397, Comment (b), and § 603, and is not in any sense inconsistent with the cases of *Hughes v. Fetter* and *First National Bank of Chicago v. United Airlines*. Those cases held invalid statutes which made the courts of one state

unavailable *at all* to litigants whose cause of action arose in another state even though, had a like cause of action arisen locally, the courts would have entertained it; but it was not suggested in either case that a state could not put a time limit on the exercise of a right in its own courts, so long as the same limit applied equally to residents of the limiting state.

The additional emphasis given by *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938), and the cases which followed it, to the elimination of both procedural and substantive differences between the remedy afforded by federal courts in diversity cases and that available in the state courts, is wholly inconsistent with the idea of exempting foreign plaintiffs in diversity cases from the effects of local statutes of limitation. Compare the statement appearing in *Klaxon Co. v. Stentor Co.*, 313 U. S. 487, 496 (1941), that "The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in co-ordinate state and federal courts sitting side by side," since, as said by the Court in *Woods v. Interstate Realty Co.*, 337 U. S. 535, 538 (1949), "For the purposes of diversity jurisdiction a federal court is 'in effect, only another court of the state . . .'".

In *Pacific Ins. Co. v. Comm'n.*, 306 U. S. 493, 502 (1939), it was said:

> "And in the case of statutes, the extra-state effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that *the full faith and credit clause does not require one state to substitute for its own statute*, applicable to persons and events within it, *the conflicting statute of another state*; even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events." (Emphasis supplied.)

Speaking of the desirability of uniformity in the operation of statutes of limitations, this Court in *Guaranty Trust Co. v. York*, 326 U. S. 99 (1945), quoted with approval what was said by Judge Hand, dissenting in the court below (p. 111):

> "In my opinion it would be a mischievous practice to disregard state statutes of limitation whenever federal courts think that the result of adopting them may be inequitable. Such procedure would promote the choice of United States rather than of state courts in order to gain the advantage of different laws."

Continuing, the Court itself, in holding that in a diversity case a recovery cannot be had in a federal court sitting in a state whose statute of limitations would have barred the recovery had a suit been brought in the court of such state, said (p. 112):

> "The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law. Certainly, the fortuitous circumstance of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident. The source of substantive rights enforced by a federal court under diversity of jurisdiction, it cannot be said too often, is the law of the States."

It was in the observance of the principles announced by this Court in the foregoing cases that the only two Courts of Appeal that have considered the question raised by the instant case have reached the same conclusion. *Hughes v. Lucker*, 174 F. 2d 285 (C. A. 3rd, 1949); *Zellmer v. Acme Brewing Co.*, 184 F. 2d 940 (C. A. 9th, 1950). And it was because of its understanding application of the Pennsylvania law in the distinctions it makes between death actions and survival actions, and in the full knowledge that the separate periods of limitation applicable under the Death Act and Survival Act are applicable to residents and non-

residents alike and without discrimination, that the Court below has twice within the year rejected the argument made by the petitioner here because of its faulty premise (R. 25; Appendix p. 28).

V. Petitioner's Argument.

Petitioner's entire argument is based, as was her petition for rehearing in the Court below, "on an entirely erroneous conception" of the Pennsylvania Survival Act of 1937 (R. 25). She confuses the Pennsylvania Survival Act of 1937 with the Pennsylvania Death Acts of 1851 and 1855, claiming that the Act of 1937 gives a complete remedy in Pennsylvania for wrongful death. As pointed out by the Court below (R. 25) "The Supreme Court of Pennsylvania has explicitly ruled to the contrary and has held that the Acts of 1851 and 1855, known as the Death Acts, alone make recoverable the type of damages described by the plaintiff."

In her misinterpretation of the Pennsylvania law petitioner has made throughout her brief a number of totally unwarranted statements. Thus in her statement of the Question Presented she says (brief, p. 2), "An Alabama statute gives to the personal representative of one killed by negligent act in Alabama a direct right of action, with a two-year statute of limitations". This is true; but she also says, "A Pennsylvania statute gives a similar direct right of action to the personal representative of one killed by negligent act in Pennsylvania, also with a two-year limitation." This statement is not true. The direct right of action given by the Alabama statute is a death action which authorizes a recovery "for the benefit of next of kin" but not "for the benefit of the estate". *Parker v. Fies & Sons*, 243 Ala. 348, 349, 10 So. 2d 13, 14 (1942). The similar right of action given by a Pennsylvania statute is that given by the Death Act of 1851, which has a one-year limitation under the Act of 1855. It is the Survival Act of 1937 that has the two-year limitation; but that is an entirely dissimilar statute, which gives a different right of action to different people

for the benefit of the estate of the deceased. Thus the Supreme Court of Pennsylvania has said in *Pezzuli v. D'Ambrosia*, 344 Pa. 643, 647, 26 A. 2d 659, 660 (1942), that actions brought under the Act of 1851 and 1855 and under the Act of 1937 "are entirely dissimilar in nature" and in *Stegner v. Fenton*, 351 Pa. 292, 295, 40 A. 2d 473, 475 (1945), that

> "By no stretch of imagination can the provisions of that act [the Act of 1855] be grafted upon the 'survival' Act of 1937, supra, which was passed for an entirely different purpose. The Acts of 1851 and 1855, supra, are 'death' statutes, not 'survival' acts."

And in *Piacquadio v. Beaver Valley Service Co.*, 355 Pa. 183, 185, 49 A. 2d 406, 407 (1946), the same court said:

> "Different statutes of limitation apply to the two causes of action. The one-year limitation of the Wrongful Death Act is not applicable to a suit brought pursuant to the Survival Act."

It is therefore apparent that petitioner's statement in her Specification of Errors (brief, p. 5) that her suit "would also have been in time if brought in Pennsylvania had the accident occurred in that State," is directly at variance with the pronouncements of the Supreme Court of Pennsylvania.

In her statement of the summary of her argument petitioner says (brief, p. 6) that the Pennsylvania Act of 1937, the Survival Act, "gives a complete remedy for wrongful death in Pennsylvania". This statement is simply not true. *Pezzuli v. D'Ambrosia*, 344 Pa. 643, 26 A. 2d, 659 (1942); *Kaczorowski v. Kalkosinski*, 321 Pa. 438, 184 Atl. 663 (1940). In *Funk v. Buckley & Co. Inc.*, 158 Pa. Super. Ct. 586, 590, 45 A. 2d 918, 920 (1946), the court said:

> "The Wrongful Death and the Survival actions, although now redressed in one suit . . . are distinct and separate actions, entirely dissimilar in nature, and are cumulative not alternate."

and again, pp. 591, 921:

> "In Wrongful Death cases the suit is based upon the liability of the tort-feasor to decedent's dependents, notwithstanding that now the action is brought for them by the personal representatives. . . . In survival cases, the action enforces the liability of the tort-feasor to the decedent's estate, not to his relatives or his dependents."

On page 8 of her brief petitioner again repeats the incorrect statement that the Pennsylvania Act of 1937 "provides a complete remedy for death through negligence," citing *Murray v. P. T. C.*, 359 Pa. 69, 58 A. 2d 323 (1948). However, far from supporting petitioner's statement, that case related solely to the proper measure of damages recoverable in an action brought under the Act of 1937, but in it the Court expressly recognized the distinction between the Death Act of 1851 and the Survival Act of 1937.

Again on page 13 of her brief petitioner says that the Pennsylvania Act of 1937 "as construed by the Pennsylvania Supreme Court, allows a two-year limitation for actions in Pennsylvania on suits by a personal representative for the wrongful death of his decedent". As pointed out heretofore, *supra*, pp. 8-9, the Pennsylvania Supreme Court has construed the Act of 1937 not as a wrongful death act but as a survival act which "merely continues in his personal representatives the right of action which accrued to the deceased at common law because of the tort". *Pezzuli v. D'Ambrosia*, 344 Pa. 643, 647, 26 A. 2d 659, 660 (1942).

Petitioner cites in support of her statement the case of *Stegner v. Fenton*, 351 Pa. 292, 40 A. 2d 473 (1945). However, that case merely emphasizes petitioner's misunderstanding of the law of Pennsylvania. In it the Court pointed out that actions for "wrongful death" i.e., those authorized by the Act of 1851, were governed by the one-year limitation prescribed by the Act of 1855 but held that:

"Since a suit by a personal representative under the Act of 1937 is identical to that which decedent might have commenced and prosecuted during his lifetime and, therefore, governed by the same measure of damages, it is but logical to conclude . . . ." that it is governed by the two-year limitation which would control the suit had it been "brought by the injured person during his lifetime, ..." 351 Pa. at p. 296, 40 A. 2d at p. 475.

It is accordingly completely unjustified for petitioner to say, as she does on page 13 of her brief that "The existence of the 1937 Act is conclusive that Pennsylvania 'has no real feeling of antagonism' against two-year limitation periods in actions for wrongful death".

Pennsylvania has always had a one-year period of limitation in "actions for wrongful death" and has allowed two years within which to bring a suit only in respect of survival actions, i.e., those that are "identical to that which decedent might have commenced and prosecuted during his lifetime"; but in applying the one-year limitation to death actions Pennsylvania has applied them to all alike, whether the death occurred within or without the state. Thus in *Rosenzweig v. Heller*, 302 Pa. 279, 285, 153 Atl. 346, 348 (1931), the Court said:

"Statutes of limitation should operate equally upon litigants seeking relief in our courts, upon those invoking remedies here for causes of action originating elsewhere, the same as upon those whose rights arise directly in our Commonwealth"

and again on pp. 286, 348, quoting from *Hutchings v. Lamson*, 96 Fed. 720, 721 (C. A. 7th, 1899):

"It would involve serious and possibly absurd consequences, if it were established that a right of action created and governed by the law of Kansas could be enforced in Illinois after the time when, by the law of the latter state, the action had been barred".

That this is still the law of Pennsylvania is apparent from the case of *Foley v. The Pittsburgh-Des Moines Co.*, 363 Pa. 1, 10, 68 A. 2d 517, 522 (1949) where the Court said:

> "As to the Statute of Limitations, a suit on a cause of action created by a statute which limits the time in which an action may be brought must be started within that time, but if the law of the forum provides a shorter period the action must be brought within the period thus prescribed".

It was this rule to which the Courts below gave effect in dismissing the present action. Petitioner has cited no case holding that the application of this rule would violate the Full Faith and Credit clause and the cases cited heretofore on page 13 expressly hold that it does not.

It is obvious that the case of *Engle v. Davenport*, 271 U. S. 33 (1926), cited by petitioner on page 18 of her brief, has no application here. The Congress has the right under its paramount authority to fix the time within which suits may be brought in state courts to redress wrongs about which it has the constitutional right to legislate. However, it has never been held that the legislature of a state may require another state to make judicial process available to its citizens beyond the time within which it would be available to its own. Thus the fact that state courts must conform to periods of limitation set by Congress in respect of rights which it creates is without significance in determining the right of a state to say within what period non-federal rights may be enforced in its courts.

It may also be noted that if petitioner's argument were given full effect she still would have no right to bring a suit in Pennsylvania. The act which created her right of action expressly limited its enforcement to the geographical limits of the State of Alabama and did not purport to create a right that could be enforced elsewhere. It is thus apparent that the Alabama Legislature had no intention of

seeking to impose on other states a period of limitation different from their own, a period which, in this case, would be obnoxious to the public policy of Pennsylvania as declared by its legislature and by its courts.

The cases cited by petitioner in note (17) on page 18 of her brief do not support her argument. In only one of them, *McMillen v. Douglas Aircraft Co.*, was the full faith and credit clause considered, and there the court reached the same conclusion as the Courts below. The other cases which held that the period of limitation of the forum was controlling recognized the power of a state to provide for the limitation of actions brought in its own courts. Those which held that the period of limitation of the state in which the right was created was controlling did so not on the ground that the forum had no power to prescribe a period of limitation which would control the exercise of foreign rights in its courts, but on the ground either that it had not done so or that under its own conflict of laws rule it accepted the limitation of the state which created the right.

Petitioner also refers to the Judicial Code as amended in 1948 (brief, p. 9) but does not rely on it in support of her position. However, the 1948 amendment to the Judicial Code merely made the language of the third paragraph of the Section, 28 U. S. C. § 1738, conform to the language of the Full Faith and Credit clause. Thus nothing was added by the amendment which did not already exist in the Clause itself. Since the absence of the word "acts" in any Act of Congress was not considered in any of the cases heretofore cited (pp. 12-15) to be an impediment to a determination by this Court of the applicability to state statutes of the Full Faith and Credit Clause, and specifically that the limitation of the forum was controlling even though the law of the state creating the right provided a longer period, it is submitted that the 1948 amendment made no change in the law. Merely making the statute conform to the language of

the Full Faith and Credit clause should not alter the effect of the Clause that has heretofore uniformly been ascribed to it. It did not need any implementation. See Mr. Justice Jackson's article, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Columbia Law Review 1, 11. And certainly the use of the same word, "acts", which appears in the Constitution, should not be interpreted differently now that it also appears in the Judicial Code.

Not only is there no need to interpret it differently but it would create a manifest hardship, in addition to a drastic change in the law, if the forum were required to act in respect of its own citizens contrary to its own public policy in order to give effect to the policy of another state. States have not been required so to act heretofore. See *Atchison, Topeka & Sante Fe Ry. v. Sowers*, 213 U. S. 55, 67-8 (1909); *Bradford Electric Co. v. Clapper*, 286 U. S. 145, 160 (1932); *Klaxon Co. v. Stentor Co.*, 313 U. S. 487, 498 (1941). And such a requirement would seem to be particularly inappropriate in respect of an act, such as the Alabama Homicide Act, which the legislature of such other state had declared should have no extraterritorial effect.

In *Griffin v. McCoach*, 313 U. S. 498 (1941), it was said, p. 507:

> "Where this Court has required the state of the forum to apply the foreign law under the full faith and credit clause or under the Fourteenth Amendment, it has recognized that a state is not required to enforce a law obnoxious to its public policy."

It would be obnoxious not only to the public policy of Pennsylvania but to the practice which has had uniform approval for over 100 years to hold a resident of Pennsylvania subject to suit in the courts of Pennsylvania by a non-resident, suing on a foreign cause of action, for a period of time longer than he would be subject to answer a like suit by a resident whose cause of action arose in Pennsylvania.

It is accordingly submitted that there was no compelling reason for the Courts below to disregard the settled policy of Pennsylvania in this case.

VI. Conclusion.

Pennsylvania allows anyone, resident or non-resident, to bring a wrongful death action within one year and a survival action within two years, but plays no favorites and applies the same rules to all alike.

In the present case petitioner is seeking in the Federal Court sitting in Pennsylvania not equal but more favorable treatment in respect of a cause of action arising in Alabama than a Pennsylvania resident would be entitled to receive in a Pennsylvania Court in respect of a like cause of action arising in Pennsylvania, and it is accordingly submitted that the judgment should be affirmed.

Respectfully submitted,

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APPENDIX.

STATUTES REFERRED TO IN RESPONDENT'S BRIEF.

PENNSYLVANIA STATUTES.

Wrongful Death Acts.

Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned. (Act of April 15, 1851, P. L. 669, § 19, 12 P. S. § 1601.)

The persons entitled to recover damages for any injuries causing death shall be the husband, widow, children, or parents of the deceased, and no other relatives; and that such husband, widow, children or parents of the deceased shall be entitled to recover, whether he, she or they be citizens or residents of the Commonwealth of Pennsylvania, or citizens or residents of any other State or place subject to the jurisdiction of the United States, or of any foreign country, or subjects of any foreign potentate; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors under the laws of this Commonwealth. If none of the above relatives are left to survive the decedent, then the personal representative shall be entitled to recover damages for reasonable hospital, nursing, medical, funeral expenses, and expenses of administration necessitated by reason of injuries causing death. (Act of April 26, 1855, P. L. 309, § 1; Act of June 7, 1911, P. L. 678, § 1; as amended by Act of April 1, 1937, P. L. 196, § 1, 12 P. S. (Supp.) § 1602.)

The declaration shall state who are the parties entitled to such action; the action shall be brought within one year after the death, and not thereafter. (Act of April 26, 1855, P. L. 309, § 2, 12 P. S. § 1603.)

Survival Act of July 2, 1937.

Executors or administrators shall have power, either alone or jointly with other plaintiffs, to commence and prosecute all actions for mesne profits or for trespass to real property, and all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander and for libels; and they shall be liable to be sued, either alone or jointly with other defendants, in any such action, except as aforesaid, which might have been maintained against such decedent if he had lived.

All such rights of action which were not barred by the statutes of limitation at the time of the death of decedent may be brought against his executors or administrators at any time within one year after the death of the decedent, notwithstanding the provisions of any statutes of limitations whereby they would have been sooner barred. (Act of June 7, 1917, P. L. 447, § 35 (b); Act of March 30, 1921, P. L. 55, § 1; Act of May 2, 1925, P. L. 442, § 1; Act of July 2, 1937, P. L. 2755, § 2, 20 P. S. Ch. 3, App. § 772.)

ALABAMA STATUTES.

Homicide Act.

Action for wrongful act, omission, or negligence causing death. A personal representative may maintain an action, and recover such damages as the jury may assess in a court of competent judisdiction within the State of Alabama, and not elsewhere for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his tes-

tator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for the wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate. (Tit. 7, Code of Ala. 1940, § 123.)

SURVIVAL ACTS.

All actions on contracts, express or implied; all personal actions, except for injuries to the reputation, survive in favor of and against the personal representatives. (Tit. 7, Code of Ala. 1940, § 150.)

No action abates by the death or other disability of the plaintiff or defendant, if the cause of action survive or continue; but the same must, on motion, within twelve months thereafter, be revived in the name of or against the legal representative of the deceased, his successor or party in interest; or the death of such party may be suggested upon the record, and the action proceed in the name of or against the survivor. (Tit. 7, Code of Ala. 1940, § 153.)

OPINION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,796

MARGARET QUINN, ADMINISTRATRIX OF THE ESTATE OF JOHN M. QUINN, DECEASED, AND MARGARET QUINN, IN HER OWN RIGHT;

Appellant

v.

SIMONDS ABRASIVE COMPANY, SUCCESSOR TO ABRASIVE COMPANY OF PHILADELPHIA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued October 14, 1952

Before GOODRICH, MCLAUGHLIN and STALEY, *Circuit Judges*

OPINION OF THE COURT

(Filed October 21, 1952)

By GOODRICH, *Circuit Judge.*

This appeal raises three points. It is an action brought in a federal court in Pennsylvania for an alleged wrongful death in Ohio. The action was brought after one year but before two years had elapsed. The plaintiff claims that because of the construction by the Supreme Court of Pennsylvania of the 1937 Survival Statute, the Pennsylvania decision of Rosenzweig v. Heller, 302 Pa. 279 (1931) is not applicable. This point has already been con-

sidered by this court and decided against the argument of the plaintiff. Wells v. Simonds Abrasive Co., 195 F. 2d 814 (3d Cir. 1952) rehearing denied. We adhere to our former decision.

The second point raised is that Pennsylvania is refusing the full faith and credit required by the Constitution in closing the doors of its courts after one year. We are advised that this point is to be argued in the Supreme Court in Wells v. Simonds Abrasive Co., 52 Misc. Dkt., certiorari granted October 13, 1952. Until the Supreme Court tells us differently, however, we see no violation of full faith and credit here. The Pennsylvania statute is applicable to all plaintiffs whether they live in Pennsylvania or somewhere else. For a long time it has been thought that a state could control the time in which actions are to be brought locally providing there is no discrimination. That is this case.

Finally, the appellant urges that the case should be sent back to Ohio under Section 1404 (a) of the judicial code. Without being required to go so far as many courts have gone in the application of this section, it is sufficient here to point out (a) that the plaintiff's application for transfer was conditioned upon his losing the motion for summary judgment which his opponent had made; and (b) that while the plaintiff comes from Ohio, the defendant and its factory are located in Pennsylvania. There was no abuse of discretion by the district judge in denying the conditional motion to transfer.

The judgment is affirmed.